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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KEVIN DUANE CARPENTER, Defendant and Appellant.	G039688 (Super. Ct. No. 03HF1442) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Following a bench trial, the trial court found defendant Kevin Duane Carpenter guilty of two counts of deliberate and premeditated attempted murder (Pen. Code, §§ 664; 187, subd. (a); all statutory references are to the Penal Code unless noted) and other crimes. He challenges the sufficiency of the evidence to sustain the court's finding of premeditation and deliberation. For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In October 2003, Carol Jackson employed defendant as a part-time groundskeeper and handyman at her rented Newport Beach home. He had worked for her for about 10 months. In addition to his regular duties, defendant also had helped Jackson with her divorce by filing court papers and escorting her to court. In September 2003, defendant indicated to Jackson he held romantic feelings toward her, but Jackson rebuffed his overtures, explaining she wanted to maintain only a working relationship and a friendship, but if he could not accept that she would terminate his employment with her.

On October 15, defendant arrived at his usual time around 8:00 a.m. He showed Jackson a notice or citation that his car had been impounded a few days earlier and started to talk about the issue. Jackson put him off, explaining she was busy working on the computer and they would talk later. He began performing his assigned tasks.

Jackson's personal assistant Sharon McKeag testified defendant greeted her normally when he arrived that morning, and complimented her on her shoes. She asked defendant if he needed anything from the store, and he requested ant spray. She left for the store in Jackson's SUV sometime between 8:00 and 9:00 a.m.

After McKeag departed, defendant approached Jackson in the kitchen and asked for her assistance in repairing a door in one of the children's rooms. Jackson asked

if McKeag could help, but defendant said McKeag had left. Jackson walked to the bedroom, knelt, and held the molding as he directed.

Without warning, defendant attacked Jackson with a hammer, rendering her unconscious. When she awoke, she was on the floor on the other side of the room. Her bathrobe was torn and defendant was yelling and hitting the side of her head with the hammer. He held what appeared to be a gun in his hand and began binding her hands and feet with duct tape and an electrical cord from her blow dryer. She felt warm blood on her head.

Defendant placed duct tape over Jackson's mouth and then berated her for not listening to him and treating him like a "second-class citizen." He complained she treated other men better than him, although he was the right person for her. Defendant screamed he would make Jackson listen and then kill her and himself.

Defendant also complained Jackson sided with her landlord after the landlord expressed dissatisfaction with some of defendant's repairs. He retrieved an audio tape recording of the landlord's observations during a walk-through inspection of the residence and played it for Jackson. Defendant screamed at Jackson that she and the landlord were wrong. Jackson was aware defendant was hypersensitive about negative comments and could misunderstand or misinterpret constructive criticism as personal criticism. Defendant left the room after playing the tape, but ordered Jackson not to move or make any sound. Jackson looked at the wall clock and it was about 9:30 a.m.

McKeag returned from the store shortly before 10:00 a.m. She parked in the detached garage next to Jackson's Mercedes. She did not remove the SUV's gas cap, nor did she see a green hose protruding from the Mercedes gas tank. She carried groceries to the house and noticed the front door was slightly ajar. She pushed it with her foot and stepped into the residence. Defendant approached, put his arms around her in a bear hug, and forced her to the master bedroom, located at the opposite end of the house from the bedroom where defendant had left Jackson. He screamed "get down" and

pushed her to the floor. He picked up a pillow from the floor, which had been on the bed earlier that morning, revealing duct tape, a gun, and a hammer. Shaking the hammer in McKeag's face, defendant threatened to "bash her brains in" and that he was going to kill her. He also put the gun to her head. Defendant managed to tape her arms and hands behind her back despite McKeag's resistance. He also taped her legs from her knees to her ankles.

Meanwhile, unable to free herself or stand up, Jackson inched down the hallway on her stomach to a bathroom, and then crawled to the kitchen where there was a phone. She started kicking the cabinets, chewed through the duct tape and began screaming, trying to divert defendant's attention from McKeag, who she could hear screaming.

Defendant appeared agitated and angry as he assaulted and tied up McKeag. He claimed she and Jackson bore responsibility for his car being impounded and accused her and Jackson of talking behind his back. He screamed "they" were all out to get him, and neighbors had spoken ill of him to Jackson's older son. At one point, McKeag complained she could not breathe and begged defendant not to hurt her. He told her she would see her boyfriend again and he pulled the duct tape below her nostrils so she could breathe. McKeag heard Jackson screaming in another room. Defendant responded to Jackson's screams, leaving McKeag in the room.

Defendant entered the kitchen in a rage, yelling and screaming because Jackson had moved to the kitchen. He dumped one or two bottles of liquor from a kitchen cabinet on Jackson, taunting her that she liked alcohol "so here's some." He removed a faux-gun cigarette lighter from a drawer and unsuccessfully tried to light it. He then took paper towels and rolled them into a torch and lit it on the gas stove. Defendant approached Jackson and threatened to ignite her as he waved the flame in front of her. He threatened to kill her, claiming she did not deserve to live, and he did not have anything to live for because neither his daughter nor anyone else cared about him. He ran

in and out of the kitchen three or four times. At one point, he grabbed a butcher knife, pointed it at Jackson and threatened to kill her with it.

McKeag worked her hands loose after about 15 minutes and escaped through a sliding glass door in the master bathroom. She did not see fire or smell smoke. She flagged down a passing motorist and called 911. Defendant came out of the house as they drove past him. According to Jackson, defendant began threatening her with the fire after he could not find McKeag in the house and realized she had escaped. He said something like "[o]h shit. . . . [She]'s gone and left. She's not there anymore."

An officer arriving on the scene shortly after McKeag's 911 call spotted defendant through the front door splashing the contents of a liquor bottle on the living room floor and ceiling. Defendant briefly emerged from the house and officers yelled for him to drop to the ground. He retreated into the house, locked the door, and fled the scene, apparently through a rear window.

Jackson smelled smoke and heard the crackling sounds of fire. Police officers arrived and carried her through the smoke-filled house to safety.

Jackson suffered a skull fracture and multiple scalp lacerations. McKeag suffered multiple bruises and a "burn" on the back of her neck from the duct tape. The house burned to the ground. Investigators opined defendant started multiple separate fires by stacking small piles of fabric or debris and using an ignitable liquid. The gas cap had been removed from Jackson's SUV and a green hose extended from the opening of the gas tank in Jackson's other vehicle.

After his arrest, defendant waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436) and admitted he attacked the women and set the fires. He asserted Jackson would not listen to what he had to say and he wanted her to hear the tape with the landlord. He explained that as a 41-year-old man he grew tired of people telling him "to shut up and sit down and just take things." He complained Jackson and McKeag did not listen to him and talked over his head.

He also admitted he loved Jackson, wanted to date her, but she had turned him down. He admitted threatening to kill her and himself, but claimed he did not mean what he said and insisted he was not going to kill anybody. Defendant explained he panicked and "things just got away from him." He claimed he left a laundry room door open so Jackson could escape, although Jackson and an officer testified the door was closed. He tried to siphon gasoline from Jackson's cars to start a fire but he could not get enough gas out. He poured liquor on Jackson because she was too much of a social person, explaining he did not drink liquor, and believed she also should not drink. He knew pouring alcohol on Jackson could cause her serious harm as a result of the fire. Defendant admitted he brought the gun, an inoperative starter pistol, to force Jackson to listen to him and the tape of the landlord.

Defendant denied any prior mental illness, but said he had taken an exam at his church and learned he needed Ritalin. He feared driving through largely Hispanic Santa Ana because he was an African-American. He told Jackson and his bishop he had found a bullet on the doorstep of his motel and thought this was a sign he should move on.

Defense

Bishop Morris Parker of the Church of Jesus Christ Latter-Day Saints testified he interviewed and met with defendant regularly after defendant moved into their ward about six months before the crimes occurred. Parker never observed any evidence defendant was violent or aggressive, and did not believe it was part of his character. Parker suggested something must have "flipped out in his mind." Bishop Richard Hancock shared Parker's opinion defendant was nonviolent. Hancock described defendant as mellow and friendly, but acknowledged defendant became frustrated if he thought people were not listening to him.

Defendant's older brother Mickey testified defendant lived with him after defendant separated from his wife in Atlanta. Mickey asked him to move out around Christmas 2002 because of personality conflicts with Mickey's son.

Psychiatrist Roderick Pettis testified defendant had significant brain damage, possibly related to a head injury he received at age 5. According to Pettis, defendant suffered from cognitive impairment and had an IQ of 78, which meant he operated at a level just above mental retardation.[1] Defendant scored even lower for verbal IQ, falling in the range for mild mental retardation and placing him at a third or fourth grade level for math and verbal skills, equivalent to an eight- to 10-year old. His deficits made it likely he would misunderstand others and others would misunderstand him. Defendant had difficulty concentrating and his cognitive impairment made it difficult for him to rapidly process changing environmental demands. Pettis opined that the "nature and severity of his cognitive impairment could be expected to adversely impact his planning, judgment, and ability to anticipate the effects of his actions," causing erratic or impulsive behavior.

Pettis also concluded defendant suffered from mental illness in addition to brain damage. Although not certain, Pettis believed defendant had a paranoid personality disorder that lead to delusional thinking, and under stress could become psychotic. Defendant reported two brothers may have suffered from mental illness, and asserted he once heard a voice declaring Jesus was a perfect miracle. Defendant also claimed he could read children's thoughts.

Pettis explained the damaged prefrontal portion of defendant's brain impaired his executive functioning, which affects the ability to integrate information before taking action, to weigh pros and cons and think through the possible consequences

[1] Pettis relied in part on a report from a neuropsychologist who gave defendant a battery of neurological and psychological tests. The neurologist did not testify, but the parties stipulated to admit his report into evidence.

of one's actions. Pettis conceded this did not mean defendant could not plan, but in Pettis's view, defendant's actions during the crime involved learned behaviors that did not require an ability to weigh consequences and did not affect Pettis's opinion defendant was impaired. Pettis acknowledged deficits such as defendant's would not preclude the ability to consider consequences, but emphasized defendant possessed a limited ability to weigh and understand those consequences.

Following a trial in October 2005, the court found defendant guilty of two counts of premeditated and deliberate attempted murder, arson of an inhabited dwelling using an accelerant, residential burglary, assault with a deadly weapon, two counts of false imprisonment by violence, and two counts of criminal threats. In February 2006, the court imposed consecutive life terms with the possibility of parole for the attempted murders, a consecutive three-year term for assault with a deadly weapon, and stayed (§ 654) terms for the other offenses. We granted defendant's petition for relief from failure to file a timely notice of appeal in December 2007. (*In re Benoit* (1973) 10 Cal.3d 72.)

II

DISCUSSION

Defendant challenges the sufficiency of the evidence to support the trial court's finding of premeditation and deliberation. Relying on the psychiatric and neurological evidence, defendant argues no reasonable trier of fact could have concluded the attempted killings were the result of preexisting reflection and the weighing of consequences rather than an unconsidered or rash impulse. We conclude substantial evidence supports the trial court's finding.

We must affirm the judgment if substantial evidence supports the finding on premeditation and deliberation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124 (*Perez*).) Substantial evidence is evidence of legal significance, reasonable in nature,

credible, and of solid value. (*People v. Samuel* (1981) 29 Cal.3d 489, 505.) We review the entire record in the light most favorable to the judgment below and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Consequently, a defendant attacking the sufficiency of the evidence "bears an enormous burden." (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

Review of evidence supporting a finding of premeditation and deliberation involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation. (*Perez, supra,* 2 Cal.4th at p. 1124; *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*).) Deliberation refers to the actor carefully weighing considerations in forming a course of action; premeditation means the actor thought over those considerations in advance. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) "'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

As stated in *Anderson*, premeditation and deliberation may be shown by circumstantial evidence. (*Anderson, supra,* 70 Cal.2d at p. 25.) *Anderson* identified three types of evidence bearing on premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or

(3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson*, *supra*, 70 Cal.2d at pp. 26-27, original italics.) The *Anderson* factors provide a framework in analyzing the sufficiency of the evidence of premeditation and deliberation, but a finding all the factors are present is not required to sustain a finding of premeditation and deliberation. (See *Perez*, *supra*, 2 Cal.4th at p. 1125.)

Here, the evidence demonstrated defendant harbored several motives prompting him to attempt to kill his victims. Defendant had recently encountered a spate of difficulties, sending his life into a downward spiral. He had been evicted from his brother's home and struggled to afford a place to live, sometimes sleeping in his car. Defendant had difficulty finding and keeping employment, and disliked the area where he had rented a motel room. Defendant's car recently had been impounded, adding to his difficulties. Jackson unwittingly exacerbated defendant's frustration when she rejected his romantic overtures and gave Jackson the impression she did not have time to hear about his travails. Based on his statements before and during the crime, defendant loved Jackson but contemplated killing her and himself because she had spurned his advances. Jackson bitterly resented her attention to other suitors when he viewed himself as her best match. As for McKeag, defendant blamed her for the loss of his car and accused her and Jackson of criticizing him behind his back. He felt both Jackson and McKeag did not listen to him or care about his problems. Finally, both women were potential witnesses to his crimes, beginning with his assault on Jackson.

As for planning activity, defendant obtained a starter pistol and modified it to hold a bullet casing so it would look like a real gun. He brought the gun and a tape player to Jackson's house on the day of the attacks and waited for everyone in the household to leave before he assaulted Jackson. He also concealed a hammer, duct tape, and the pistol under a pillow in preparation for his assault on McKeag when she returned from the store.

The manner of the attack suggested a preconceived design to kill. Defendant enticed Jackson into a more vulnerable position in the bedroom and then assaulted her with a hammer, fracturing her skull. The trial court could reasonably infer defendant decamped to the garage and attempted to siphon gas from Jackson's cars after he tied up his victims. When this attempt failed, he returned to Jackson, poured liquor over her and attempted to light her on fire with a cigarette lighter. He spread alcohol around the house and lit several fires. Thus, substantial evidence shows defendant had a motive to kill Jackson and McKeag, made plans toward that goal, and implemented his plans to bring about their deaths.

Defendant argues his behavior was consistent with his stated intention to get Jackson to listen to him rather than an intent to kill based on preexisting reflection. He asserts he bound up McKeag so she would not interfere with his effort to convince Jackson to listen to him. He emphasized he did not immediately start the fires after he tied both women up and cites McKeag's testimony she did not detect any smoke during the 25 minutes she was restrained in the master bedroom, nor did she see any fire before or during her escape. These inferences are plausible, but they are not the only ones the trial court could have drawn from the evidence. The trial court could reasonably conclude defendant sought the satisfaction of forcing Jackson and McKeag to listen to his complaints and learn how they had been wrong to criticize him before he implemented his plan to burn the residence while they were immobilized. The trial court also could

reasonably conclude defendant sought to retrieve the gasoline from the cars in the garage before he knew McKeag had escaped.

Defendant's reassurance to McKeag she would see her boyfriend does not undermine the trial court's conclusion. The court reasonably could conclude defendant made the comment to induce McKeag's cooperation so she would not try to escape when he left her to deal with Jackson. The court could further conclude defendant's efforts to siphon gasoline showed he planned to set the residence on fire and therefore had no intention to release McKeag.

As for the psychiatric evidence, defendant argues the court erred by "not giving due consideration to" Dr. Pettis's testimony. Although the court was free to reject Pettis's testimony even if uncontradicted (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232), neither the prosecutor nor the trial court discounted evidence of defendant's mental deficits. Nor did the court restrict Pettis's testimony as in several of the cases defendant cites. The court did find the mental illness diagnosis vague, but Pettis himself hedged in attempting to classify defendant. Consequently, the psychological testimony did not indisputably point to a finding of no premeditation or deliberation. Indeed, Pettis conceded a person with defendant's deficits could have planned and deliberated attempted murder. Defendant admitted to an officer after his arrest he knew pouring alcohol on Jackson could cause her serious harm as a result of the fire, and lied to the officer when he claimed he left a door open for Jackson to escape, all of which seemed at variance with impaired executive functioning.

Further, a finding of deliberation and premeditation is not negated by evidence a defendant's mental condition was abnormal or his perception of reality delusional unless those conditions resulted in the actual failure to plan or weigh considerations for and against the proposed course of action. A first degree murderer need not have a rational motive for killing (*People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102), nor is the necessary mental process lacking when the considerations entertained

by the defendant were the product of mental disease or defect (*People v. Stress* (1988) 205 Cal.App.3d 1259, 1270-1271). In *Stress*, the defendant suffered from a paranoid delusional psychosis prompting him to expose a national conspiracy to permit professional athletes to escape military service during the Vietnam war. He decided to kill his wife to gain the attention he needed to expose the plot. The court found sufficient evidence that he committed a deliberate and premeditated killing, explaining "[t]he mental process necessary for a finding of deliberation and premeditation is not dependent on the motivation for the act. Nor is the necessary mental process lacking when the considerations reflected on by the defendant were the product of mental disease or defect." (*Id.* at p. 127-1271.)

The conclusions defendant urges us to draw are based, for the most part, on plausible inferences. As we explained above, this is not within our purview. It is the trier of fact's exclusive province to assess the credibility of witnesses, resolve conflicts and weigh the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) After reviewing the record, we conclude substantial evidence supports the trial court's decision. Accordingly, we affirm the judgment.

III

DISPOSITION

The judgment of the trial court is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.